

NOTICE OF PUBLIC HEARING

- Subject:** Opportunity to comment on proposed repeal of Article 7 (Administrative Tribunal) and amendment of Article 1, 3, 47, and 151 of the New York City Health Code, found in Title 24 of the Rules of the City of New York.
- Date / Time:** October 25, 2011, 10:00 A.M. – 12:00 P.M.
- Location:** New York City Department of Health and Mental Hygiene
2 Gotham Center, 14th Floor, Room 14-45
42-09 28th Street
Long Island City, NY 11101-4132
- Contact:** Rena Bryant
(347) 396-6071

Proposed Rule

Pursuant to the authority vested in the Department of Health and Mental Hygiene by §§556, 558 and 1043 of the New York City Charter (the “Charter”), the Department of Health and Mental Hygiene is proposing that the Board of Health repeal Article 7 and amend Articles 1, 3, 47 and 151 of the New York City Health Code.

Specifically, Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department”) with authority to regulate all matters affecting health in the city of New York. Section 558(b) and (c) of the Charter empower the Board of Health (the “Board”) to amend the Health Code and to include in the Health Code all matters over which the Department has authority. Section 1043 of the Charter gives the Department rulemaking powers.

These amendments are also promulgated pursuant to revisions to the Charter approved by the voters in 2010, authorizing the Mayor by Executive Order to consolidate certain administrative tribunals by transferring their adjudicatory functions to the Office of Administrative Trials and Hearings (OATH).

Instructions

- Prior to the hearing, you may submit written comments about the proposed amendment by mail to

New York City Department of Health and Mental Hygiene
Board of Health
Office of the Secretary to the Board
Attention: Rena Bryant
2 Gotham Center, 14th Floor, Room 14-15, Box 31
Long Island City, NY 11101-4132;

electronically through NYC RULES at www.nyc.gov/nycrules; by email to RESOLUTIONCOMMENTS@HEALTH.NYC.GOV; or online (without attachments) at <http://www.nyc.gov/html/doh/html/notice/notice.shtml> on or before 5:00 P.M., on October 25, 2011.

- To request a sign language interpreter or other form of reasonable accommodation for a disability at the hearing, please contact Rena Bryant at the phone number shown above by October 11, 2011.
- Copies of written comments and a summary of oral comments received at the hearing will be available within a reasonable time after receipt between the hours of 9:00 A.M. and 5:00 P.M. at the

New York City Department of Health and Mental Hygiene
 Board of Health
 Office of the Secretary to the Board
 Attention: Rena Bryant
 2 Gotham Center, 14th Floor, Room 14-05, CN 30
 Long Island City, NY 11101-4132

- The Department’s general policy is to make written comments available for public viewing on the internet. The comments it receives, including any personal information provided with the comment, will be posted without change to <http://www.nyc.gov/html/comment/comment.shtml>.

Statement of Basis and Purpose

Background of the Rule Change

On November 2, 2010, New York City voters approved Charter revisions authorizing the Mayor, by Executive Order, to consolidate certain administrative tribunals into OATH. By Executive Order No. 148 (June 8, 2011) (the “Executive Order”), the Mayor ordered the transfer of the administrative tribunal “established by the Board of Health pursuant to Section 558 of the Charter” to OATH, effective July 3, 2011. The Executive Order further provided that certain provisions of the Health Code and other Rules of the City of New York pertaining to the Department’s Administrative Tribunal, as well as some additional interim procedures, would be deemed rules of OATH in accordance with the Report and the Appendix to the Report of the Committee on Consolidation of Administrative Tribunals (“Mayor’s Committee”) until OATH itself completed rulemaking in accordance with the Charter.

At its meeting on June 14, 2011, the Board of Health adopted a resolution facilitating the transfer by designating the Administrative Tribunal as the “Health Tribunal at OATH, which shall decide questions of fact and law and penalties to be imposed in all matters brought before such Administrative Tribunal.”

Summary of the Rule Change

To further facilitate a smooth transition of adjudicatory and appeals functions to the Health Tribunal at OATH, the Department is requesting the following:

- The Board should repeal Article 7, and amend other provisions of the Health Code that refer to Article 7 and/or the Administrative Tribunal to be consistent with the Executive Order and Report and Appendix of the Mayor’s Committee.
- Certain provisions of Article 7 will survive the transfer to OATH. It is proposed that these provisions be added to Article 3.

- In addition, it is proposed that the Department’s rules in Chapter 7 of Title 24 of the Rules of the City of New York (RCNY), which differentiate the matters previously assigned to the Administrative Tribunal (penalties and fines) and OATH (show cause, permit revocations and suspensions) be incorporated in Article 3 as well.
- In a separate rulemaking process, the Department will propose repealing Chapter 7 of Title 24 RCNY and Chapter 1 of Title 25 RCNY (Adjudications of the former Department of Mental Health and Retardation).

Specific Amendments Proposed

- Article 1 (Short Title and General Definitions). §1.03 (b) currently defines the Administrative Tribunal. Article 1 would be amended by having the definition refer to the new Health Tribunal at OATH and adding a definition for OATH.
- Article 3 (General Provisions).
 - §3.11 (c) currently provides that when a respondent fails to appear at the Administrative Tribunal and is found in default, any penalty imposed will be double that which would have been imposed if the respondent was found in violation after a hearing. This section would be amended to reference the new name of the tribunal and to add provisions recommended by the Mayor’s Committee related to:
 - the name of the tribunal (former §7.01);
 - jurisdiction (former §7.03); and
 - surviving provisions of Chapter 7 of Title 24 RCNY.
 - Proposed §3.12 continues the tribunal created by the Board of Health, but transfers its operation to OATH.
- Article 47 (Child Care Services). §47.77 (h) refers to the authority of the Department to issue notices of violation pursuant to Article 7. This would be amended to remove a reference to Article 7.
- Article 151 (Pest Prevention and Management). §151.05 (a) authorizes the Environmental Control Board, in addition to the Administrative Tribunal, to adjudicate notices of violation. This would be amended to remove a reference to Article 7.
- Articles 5 (General Permit Provisions) and Article 81 (Food Preparation and Food Establishments). Changes in text referencing Article 7 and the Administrative Tribunal in these articles have been proposed separately under the rule amendment process, as part of comprehensive amendments of these articles.

Statement Pursuant to Charter § 1043

This proposal was not included in the Department’s regulatory agenda because the need for the amendment became known after publication of the regulatory agenda.

The resolution is as follows:

Matter to be deleted is in [brackets]

Matter to be added is underlined.

**Proposed Amendments for the Transfer of Health Tribunal to Office of
Administrative Trials and Hearings**

RESOLVED, that Article 7 (Administrative Tribunal), and the list of section headings in Article 7 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby are, **REPEALED**, to be printed together with explanatory notes as follows.

Notes: Article 7 was repealed by resolution adopted XXX. The Administrative Tribunal established pursuant to New York City Charter §558 was transferred to the Office of Administrative Trials and Hearings (OATH), to be known as the Health Tribunal at OATH, by Executive Order No. 148, effective July 3, 2011. The Board of Health adopted a resolution on June 14, 2011 to facilitate the transfer that authorized the Health Tribunal at OATH to decide questions of fact and law in any proceeding alleging a violation of the Health Code.

RESOLVED, that subdivision (b) §1.03 (General definitions) of Article 1 (Short Title and Definitions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, and a new subdivision (k) added, to be printed together with explanatory notes as follows.

§1.03 General definitions.

When used in the New York City Health Code:

* * *

(b) *Administrative Tribunal* means the [Administrative Tribunal of the Department of Health and Mental Hygiene of the city of New York.] Health Tribunal at OATH.

* * *

(j) *State* means the state of New York.

(k) OATH means the Office of Administrative Trials and Hearings.

Notes: §1.03 was amended by resolution adopted XXX, amending the definition of the Administrative Tribunal, and adding a definition for OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011) which consolidated the Department's Administrative Tribunal and other City agencies' tribunals with OATH as a result of a 2010 Charter revision.

RESOLVED, that subdivision (c) §3.11 (Civil enforcement of the Code) of Article 3 (General Provisions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, and new subdivisions (d) and (e) added, to be printed together with explanatory notes as follows:

§3.11 Civil Enforcement of the Code

* * *

(c) Where a person fails to appear [in a proceeding] at an adjudicatory hearing to determine whether a monetary penalty should be imposed for any violation of this Code, [brought pursuant to Article 7 of this Code] the penalties imposed for each sustained violation shall be double the amount that would otherwise be assessed by the [hearing examiner] administrative law judge, but shall not exceed the maximum penalty specified in subdivisions (a) or (b) of this [Section, or in the other applicable law or regulation.] section.

Notes: Section §3.11 was amended by resolution adopted XXX, to delete a reference to Article 7 of the Health Code which was repealed when the Administrative Tribunal established by the Board of Health was transferred to OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011).

RESOLVED, that Article 3 (General Provisions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, and a new section 3.12 added, to be printed together with explanatory notes as follows:

§3.12 Administrative Tribunal

(a) The Administrative Tribunal established by the Board of Health pursuant to §558 of the Charter is hereby continued. It will be operated by and within the City's Office of Administrative Trials and Hearings and known as the Health Tribunal at OATH.

(b) Where the Department seeks a fine or monetary penalty for a violation of this Code or any other State or local law or regulation enforced by the Department, it will bring a proceeding at either the Health Tribunal at OATH or at the Environmental Control Board, and such proceedings will be governed by the procedures of such Tribunal or Board, as the case may be. The decisions of the Environmental Control Board will be final; the decisions of the Health Tribunal at Oath will be final except in the case of any appeal from an adjudication of a violation of Article 13-E of the Public Health Law.

(c) Where there is an appeal from an adjudication of a violation of Article 13-E of the Public Health Law, the Health Tribunal at OATH will, pursuant to the applicable provision of the rules of OATH governing such Tribunal, issue a recommended decision to the Commissioner for him or her to review. Within thirty (30) days of the issuance of the recommendation, the respondent may submit to the Department a written argument why the decision should or should not be followed by mailing by certified or registered mail, emailing, or delivering by hand a copy of the argument to the General Counsel of the Department. After the Department has received the respondent's argument or after forty-five (45) days have passed from when the Tribunal issued its recommended decision, whichever time is shorter, the Commissioner shall issue a written decision affirming, reversing, or modifying the recommended decision, or remanding the appeal back to the Health Tribunal at OATH for further proceedings. The Commissioner's decision must be served on the respondent by certified or registered mail. Where appropriate, the Commissioner's decision will order the Tribunal to repay the respondent any penalty that has been paid. Except when the Commissioner remands an appeal to the Health Tribunal at OATH for future proceedings, the Commissioner's decision constitutes a final agency determination.

Notes: Section §3.12 was added by resolution adopted XXX, reflecting the transfer of the Administrative Tribunal established by the Board of Health to OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011).

RESOLVED, that subdivision (h) of §47.77 (Closing and enforcement) of Article 47 (Child Care Services) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes to read as follows:

§47.77 Closing and enforcement.

* * *

(h) Department authority not limited by this section. Nothing herein shall be construed to limit the authority of the Department to issue notices of violation [pursuant to Article 7 of this Code] or commence any other proceeding or action provided for by this Code or other applicable law, including actions to deny, suspend or revoke permits.

Notes: Subdivision (h) was amended by resolution adopted XXX to reflect the repeal of Article 7, and the transfer of the Administrative Tribunal established by the Board of Health to OATH, in accordance with Mayor's Executive Order No. 148 (June 8, 2011).

RESOLVED, that §151.05 (Notices of violation) of Article 151 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes to read as follows:

§151.05 Notices of violation.

(a) *Designation of Environmental Control Board.* In accordance with §1049-a (c)(2) of the Charter, a notice of violation ("NOV") citing a violation of any provision of this Article may be made returnable to the Environmental Control Board in addition to the [Administrative Tribunal established pursuant to Article 7 of this Code] Health Tribunal at OATH.

* * *

Notes: Subdivision (a) of §151.05 was amended by resolution adopted XXX to delete a reference to Article 7 of the Health Code, which was repealed when the Administrative Tribunal established by the Board of Health was transferred to OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011).

RESOLVED, that the amendments proposed herein shall in no event take effect earlier than the effective date of amendments to the rules of OATH codifying the procedures applicable to the Health Tribunal at OATH.

**NEW YORK CITY LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007
212-788-1087**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Transfer of Health Tribunal to Office of Administrative Trials and Hearings

REFERENCE NUMBER: 2011 RG 081

RULEMAKING AGENCY: DOHMH

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1526**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Transfer of Health Tribunal to Office of Administrative Trials and Hearings

REFERENCE NUMBER: DOHMH-7

RULEMAKING AGENCY: Department of Health and Mental Hygiene (DOHMH)

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ RACHEL SQUIRE
Mayor's Office of Operations

September 7, 2011
Date